INDIANA JUDICIAL CENTER

CASE CLIPS

Selected decisions of the Indiana appellate courts abstracted for judges by the Indiana Judicial Center.

VOL. XXVIII, NO. 20 **June 15, 2001**

CRIMINAL LAW ISSUES

KYLLO v. UNITED STATES, No. 99-8508, ___ U.S. ___, ___ S. Ct. ____, __ U.S.L.W. ____ (June 11, 2001).

SCALIA, J.

This case presents the question whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a "search" within the meaning of the Fourth Amendment .

. . . .

The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical* [*Co. v. United States*, 476 U.S. 227 (1986)], we noted that we found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," 476 U.S., at 237, n. 4 (emphasis in original).

. . . .

. . . We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical "intrusion into a constitutionally protected area," *Silverman* [*v. United States*, 365 U.S. 505 (1961)], 365 U.S., at 512, constitutes a search–at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search. [Footnote omitted.]

The Government maintains, however, that the thermal imaging must be upheld because it

detected "only heat radiating from the external surface of the house," [citation to Brief omitted]. The dissent makes this its leading point, [citation omitted] contending that there is a fundamental difference between what it calls "off-the-wall" observations and "through-the-wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house—and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. . . .

. . . .

. . . The Fourth Amendment 's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too

much, 365 U.S., at 512, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes. . . .

. . . .

SOUTER, THOMAS, GINSBERG, and BREYER, JJ., joined.

STEVENS, J., filed a separate written opinion in which he dissented, in part, as follows, and in which REHNQUIST, C. J., and O'CONNER, and KENNEDY, JJ., joined:

> . . . While the Court "take[s] the long view" and decides this case based largely on the potential of yet-to-be-developed technology that might allow "through-the-wall surveillance," *ante*, at 11—12; see *ante*, at 8, n. 3, this case involves nothing more than off-the-wall surveillance by law enforcement officers to gather information exposed to the general public from the outside of petitioner's home. All that the infrared camera did in this case was passively measure heat emitted from the exterior surfaces of petitioner's home; all that those measurements showed were relative differences in emission levels, vaguely indicating that some areas of the roof and outside walls were warmer than others.
>
> . . .
>
> . . . .
>
> Thus, the notion that heat emissions from the outside of a dwelling is a private matter implicating the protections of the Fourth Amendment (the text of which guarantees the right of people "to be secure *in* their … houses" against unreasonable searches and seizures (emphasis added)) is not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building. A subjective expectation that they would remain private is not only implausible but also surely not "one that society is prepared to recognize as 'reasonable.' " [Citation omitted.]
>
> . . . .

REED v. STATE, No. 71S00-9911-CR-654, ___ N.E.2d ___ (Ind. June 8, 2001).

BOEHM, J.

Six months later, on August 20, 1998, Williams entered into a plea agreement with the State. In return for his agreement to testify truthfully against Reed, the two counts of robbery and one count of felony murder against Williams were dropped and he was allowed to plead guilty to assisting a criminal, a Class C felony.

Reed first attempted to depose Williams on December 2, 1998. When it became clear that Williams would not voluntarily give a deposition, Reed filed a motion to compel. . . . [T]he trial court denied that motion. The court took the view that because Williams' guilty plea had not

yet been unconditionally accepted by the court, Williams was still in jeopardy and could stand on his privilege against self-incrimination. On April 29, 1999, after learning that Williams had submitted to a lengthy videotaped interview with prosecutors, Reed renewed his motion to compel a deposition. On May 7, 1999, a brief hearing was held on the renewed motion. Reed argued that Williams had waived his Fifth Amendment rights by videotaping an interview with the prosecutor on April 23, 1999. The court rejected that argument and also stated that it had "no power to order the State to extend use immunity or seek use immunity from a court before the State wishes to do so." . . . The State finally requested use immunity for Williams on July 2, 1999, immediately before he took the stand to testify.

. . . .

Williams' testimony was the cornerstone of the prosecution's case against Reed. . . . Here, Williams' credibility was not merely important, it was critical. The State presented no physical evidence tying Reed to the crime scene and no eyewitnesses identified Reed as the masked gunman. The gun used in the crime was not Reed's and was never found. None of the money or personal effects taken from the victims was recovered or linked to Reed. The State's entire case rested on Williams' testimony that he had been involved in the crime and that Reed was the triggerman. . . .

. . . .

Bubb v. State noted that, although a defendant has no due process right to compel the immunization of defense witnesses, the State cannot use its power of immunization to interfere with the defense's presentation of its case. 434 N.E.2d 120, 124 (Ind. Ct. App. 1982). Williams was not a defense witness in the case against Reed; indeed, he was the key witness for the prosecution, but we think the same principles apply. The issue is whether the State's refusal to immunize Williams earlier improperly interfered with Reed's case and violated the Due Process Clause. The Court of Appeals, borrowing language from the Third Circuit, outlined a strict test:

> [T]he evidentiary showing required to justify reversal on that ground must be a substantial one. The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact-finding process. Where such a showing is made, the court has inherent remedial power to require that the distortion be redressed by requiring a grant of use immunity to defense witnesses as an alternative to dismissal.

Bubb, 434 N.E.2d at 124 [remaining citations omitted]. . . . Interference with the defendant's case or distortion of the fact-finding process may be established by showing:

> (a) prosecutorial overreaching, through threats, harassment, or other forms of intimidation, has effectively forced the witness to invoke the Fifth Amendment, or the prosecutor has engaged in discriminatory use of immunity grants to gain a tactical advantage; (b) the witness's testimony is also material, exculpatory, and not cumulative; and (c) the defendant has no other way to obtain the evidence. [Citations omitted.]
>
> . . . [T]he record establishes that the State's continued and vigorous opposition to Reed's efforts to depose Williams and its refusal to grant use immunity until moments before Williams took the stand at Reed's trial constituted interference with Reed's case.

The State offers no explanation for the prosecutor's continued attempts to block Reed's motions to compel Williams' deposition. We can see none other than an effort to gain improper tactical advantage. Williams entered into a plea agreement on August 20, 1998. It is clear from the record that the State intended to grant Williams use immunity at least as of the videotaped

interview on April 23, 1999, if not much sooner. That was two weeks before the hearing on Reed's second motion to compel Williams' deposition. The prosecutor delayed her request for immunity until July 2, 1999, the day that Williams testified at Reed's trial. Indeed, at the second hearing on Reed's motions to compel Williams' deposition on May 7, the State actively argued against the motion. Williams' lawyer was present but said nothing.

At the time that Reed sought to depose Williams, the only clues Reed had to this key witness' testimony were two partially contradictory statements Williams had made to police the day after the murder. Reed had no way of knowing whether Williams' testimony could or would be exculpatory because he had no idea what that testimony might be.

At the time of the second hearing on May 7, prosecutors continued to maintain that a deposition was useless because it would produce only claims of Fifth Amendment privilege, and

also that the now revealed videotape was "privileged." **[Footnote 2 appears as follows:** The State represented to the court that the videotaped interview constituted plea negotiations, not trial preparation. The tape itself makes clear that it was witness preparation and/or investigation, not plea negotiations.**]** . . .

. . . [I]t is not correct that the taped interview was not discoverable or usable at Reed's trial. The use of prior inconsistent statements to impeach a witness is well established. [Citation omitted.] . . . There is simply no privilege insulating Williams' dialogue with the prosecution from discovery or use in Reed's case. [Citations omitted.]

Release of the videotape to the defense did not cure this situation. The inability to depose Williams left Reed with no opportunity to expose several inconsistencies in Williams' various accounts. . . .

At the very least, Reed was entitled to access to Williams prior to trial to have an opportunity to develop and pin down Williams' testimony on these and any other potential points or at least have sworn testimony to impeach any variances. In the often quoted but worth repeating phrase from Williams v. Florida, 399 U.S. 78, 82 (1970): "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." The prosecutor's effort to hide the ball until the day of trial plainly violated that cardinal principle.

The prosecutor's handling of the immunity left the trial court with three alternatives. The trial court was correct that it could not compel immunity. [Citation omitted.] However, it could exclude Williams' testimony, dismiss the prosecution if no deposition was permitted, or grant a continuance for sufficient time to permit Reed to depose Williams and prepare a defense. [Citation omitted.] After the trial court granted immunity to Williams, Reed needed to renew his request to depose Williams and, if necessary, move for a continuance in order to preserve the issue. Reed did not do so. However, the combination of this unpreserved error and the trial court's refusal to admit the videotape to impeach Williams, . . . constitutes reversible error.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

CIVIL LAW ISSUES

STONGER v. SORRELL, No. 52A02-0007-CV-433, ___ N.E.2d ___ (Ind. Ct. App. June 11, 2001).

RILEY, J.

. . . Sorrell filed a Verified Petition for Modification of Custody and Petition for Custodial Evaluation with Dr. John C. Ehrmann, Ph.D. (Ehrmann). Ehrmann submitted a detailed written report into evidence. The report incorporated home studies, interviews by Ehrmann with the parties and the minor children, reports received from The Family Counseling Center, psychological testing performed by Ehrmann, a report from Helen Gray—a social worker who

saw the children in 1994, school records, a report from T.S.'s teacher, a psychiatrist's report on examination of the children and her testimony from a previous custody hearing, and numerous letters. The report concluded that physical custody of the children should be transferred to Sorrell as soon as possible.

. . . [T]he Miami Superior Court entered its Findings of Fact and Conclusions of Law. The trial court found that it would be in the best interests of the children that sole custody be granted to Sorrell, effective immediately. . . .

Subsequently, . . . Stonger filed his Petition to Set Aside the Court's Judgment . . . [.] Under T.R. 60(B)(8), Stonger alleged fraud upon the court. . . .

. . . .

. . . On November 19, 1994, Sorrell took T.S. and S.S. to see Jacobsen at The Family Counseling Center without Stonger's permission. . . .

On April 5, 1995, Dr. David Gover (Gover), a licensed psychologist in Jacobsen's office, purportedly wrote separate psychological reports for T.S. and S.S. The reports concerning T.S. and S.S. portrayed their relationship with Stonger in a rather poor and negative light. Both of these reports were signed by "David Gover." [Citation to Record omitted.]

When Ehrmann was assigned to conduct the custodial evaluation, he invited Stonger and Sorrell to provide him with any collateral data that would assist him in the evaluation process. . . . Sorrell signed consent forms so that Ehrmann could obtain the records of Jacobsen and Gover. Ehrmann then used these reports as part of his custody evaluation.

. . . Stonger discovered that in Jacobsen's curriculum vitae, she portrayed herself as a mental health expert, having minors in psychology in her undergraduate degree and master's degree from Indiana University; that she had completed courses in marriage and family therapy from Butler Christian Theological Seminary in 1988; and that she had some type of degree in marriage and family therapy known as an "AAMFT" from Indiana University and Purdue University at Fort Wayne. Through the testimony of the Senior Assistant Registrar from Indiana University, the Registrar at Butler University, the Registrar at Christian Theological Seminary, and the Registrar at Indiana University and Purdue University at Fort Wayne, it was found that none of these statements in Jacobsen's curriculum vitae were true.

Although certain statements in Jacobsen's curriculum vitae were false, it should be noted that through additional evidence presented, it was revealed that Jacobsen's academic credentials include: Indiana University degree, Bachelor of Science in Education, June 4, 1962—in the education department, Jacobsen's courses included: Adolescent Behavior and Development, Psychological Measurement in the School, and Social Psychology of Physical and Mental Disabilities; Indiana University degree from Indiana University Purdue University Indianapolis, Master of Science in Education, Special Education, August 31, 1975—at the Master's level, Jacobsen had one course in the psychology department, Classroom Behavior Management; participation in a credentialing process from the American Association for Marriage and Family Therapy beginning in 1975, including both classroom instruction and extensive clinical supervision, becoming an approved supervisor in 1993; Indiana University, Doctor of Philosophy, 1983; Butler University, Fundamentals of Counseling Theory and Technique, fall semester 1989-1990; clinical member in good standing in the American Association for Marriage and Family Therapy, since 1990; Family Mediation Training, completed September 25-29, 1991; licensed Marriage & Family Therapist, State of Indiana, issued August 19, 1992; licensed Clinical Social Worker, State of Indiana, issued July 9, 1993; Newport University, Newport Beach, CA, Doctor of Psychology, December 20, 1996.

Additionally, Stonger also discovered that Gover's psychological reports of T.S. and S.S. were not prepared by him or signed by him. Jacobsen's former secretary, Pam Hamstra (Hamstra), testified that she signed Gover's signature to both reports without Gover's

authorization. . . .

. . . [I]n a letter dated November 16, 1995, Sorrell's attorney wrote to her:

> Dr. Ehrmann has also indicated that he was willing to put in his report a statement regarding the negative impact of the delay on the children in order for us to stave off what we know is coming next, which will be a request from them for a second custody evaluation.

[Citation to Record omitted.] In his custody evaluation, Ehrmann wrote:

> The final recommendation offered is that this entire matter be resolved as quickly as possible. There are some emerging signs of depression in [T.S.] which are certainly of concern. Other individuals as well as this evaluator have

clearly expressed concern about the lack of resolution in this case and the need for the boys to adjust to a known future. Further delays would continue to maintain the boys in an ongoing and stressful situation.

[Citation to Record omitted.] In its August 15, 1996 Findings of Facts and Conclusions of Law, the trial court discussed Ehrmann's custody evaluation. The court stated that "[t]his report concluded that physical custody of the parties' minor children should be transferred to Mother as soon as possible." [Citation to Record omitted.]

With all of the above mentioned facts in mind, Stonger's Petition to Set Aside the Court's Judgment of August 15, 1996 alleged that: 1) Jacobsen falsely portrayed herself as having significant academic training; 2) the Gover psychological reports of T.S. and S.S. were fabricated; and 3) Ehrmann inappropriately communicated with Sorrell's counsel, and this inappropriate communication is reflected in Ehrmann's custody evaluation and in the trial court's August 15, 1996 Findings of Facts and Conclusions of Law.. . . [T]he trial court heard evidence on Stonger's Petition. At the conclusion of Stonger's evidence, Sorrell moved for a judgment on the evidence. The trial court took this matter under advisement. . . .

> Most troubling to the Court is the evidence concerning the report of Dr. Gover. . . .
>
> From the evidence presented, the Court believes that Ehrmann may not have done a very good job . . . ; the Court does not believe that he performed in bad faith. It is probably important to state first that the Court believes his testimony that the Gover/Jacobsen evaluation and materials were not significant to his decision and carried little weight. . . .
>
> . . . The Court was surprised to earn [sic] from Lawler [sic] that there is no professional bar for the evaluator from making preliminary communications with the sides in a custody dispute. Ehrmann did not initiate the communication. The worst that could be said is that he accepted a recommendation from one side prior to issuance of his opinion. . . .
>
> The Court's analysis of the evidence presented is that the Gover/ Jacobsen report is a fabrication, but it does not count for much. The balance of fraud allegations against Beth [Sorrell], Gloria Grinnan-Mitchell, and Dr. John Ehrmann are unproven. [Citation to Record omitted.]
>
> . . . [T]he trial court entered an order denying Stonger's Petition to Set Aside the Court's Judgment of August 15, 1996. In its Order, the trial court referred to its March 8, 2000 memorandum as its reasoning for denying Stonger's Petition.
>
> . . . .
>
> Sorrell has attempted to convince this court that because Ehrmann's recommendation would have remained the same with or without the information

> from Jacobsen and Gover, a fraud upon the court has not been perpetrated. We disagree. . . . [I]t is clear that trial court was influenced by Ehrmann when deciding to transfer custody of T.S. and S.S. from Stonger to Sorrell. The trial court refers to Ehrmann's testimony and custody evaluation numerous times.
>
> . . . [I]t is undisputed that Jacobsen held herself out as an individual with certain academic training that she did not actually have. It is also undisputed that Gover testified that the psychological reports of T.S. and S.S. were not prepared by him or signed by him. The forged and fabricated materials from these people were then used in Ehrmann's custody evaluation. Ehrmann's custody evaluation was then used by the trial court. We find that a cloud of doubt has been cast and the entire evaluation process was tainted. When dealing with

the lives of children and family, we must be especially careful. This court cannot overlook such blatant fraud simply because the custody evaluator maintained that his recommendation would have remained the same without the forged and fabricated materials. It would be an injustice not only to the parties involved, but to the entire legal and judicial process.

. . . .

Clearly, there are differing viewpoints on intent and fraud upon the court. It is our determination that intent is not absolutely necessary to establish fraud upon the court. . . . [W]e also find that whether the deprivation of a party's rights by actions of the court are attributable to a willful intent to defraud or a reckless disregard of rules or statutory provisions, the court has the same duty to rectify the wrong, regardless of intent.

We agree with Stonger that fraud upon the court may be imputed to a party through its agent. Additionally, we should note that this process of fraud began when Sorrell took T.S. and S.S. to Jacobsen's office upon her attorney's referral and without the knowledge of Stonger. If a party, attorney or other person, acting in furtherance of a party, attempts to or defiles the custody evaluation process through the use of forged or fabricated psychological reports and the use of purported counseling records from a person with fraudulent academic records and credentials, the determination of custody has been corrupted. Once the statutory and judicial process is effectively corrupted, the court has a duty to rectify the wrong, regardless of who perpetrated the wrong.

Accordingly, we find that Stonger has established that an unconscionable plan or scheme was used to improperly influence the trial court's decision, and that such acts prevented Stonger from fully and fairly presenting his case. [Citation omitted.]

. . . .

. . . [W]e remand this matter for rehearing. . . .

Remanded for further proceedings consistent with this opinion.

DARDEN and ROBB, JJ., concurred.

NEHER v. HOBBS, No. 92A04-0008-CV-316, ___ N.E.2d ___ (Ind. Ct. App. June 8, 2001).

ROBB, J.

Amy Neher appeals the trial court's grant of a Motion to Correct Errors in favor of Gregory and Emma Hobbs setting aside the jury verdicts and ordering a new trial in the Hobbs' action against Neher. We reverse and remand with instructions.

. . . .

. . . [T]he jury entered a verdict on the negligence claim in favor of Gregory against Neher but awarded zero ($0.00) damages. . . .

. . . .

. . . Although worker's compensation benefits were paid to Gregory, we do not believe that this conclusively proves that the automobile accident resulted in Gregory's injuries. . . .

. . . .

Immediately following the accident, Gregory drove the van back to G.T.E. headquarters and then went to receive treatment at a nearby medical facility. He later received follow-up treatments from various medical practitioners. As of January 8, 2000, Gregory's medical bills totaled $5,312.65. Medical experts

testified at trial that Gregory suffered an occipital nerve injury and that the cause of the injury was possibly the automobile collision which occurred on October 11, 1995. Evidence presented at trial established that Gregory primarily complained of chronic and severe headaches to his treating physicians.

. . . Neher elicited testimony that Gregory complained of severe headaches before the automobile accident on October 11, 1995. Therefore, the jury was presented with evidence that Gregory's injury and resulting pain from chronic and severe headaches pre-existed the automobile collision.

It is apparent from the amount of the damage award that the jury believed that Gregory's injury was pre-existing and not the result of the collision. . . .

. . . .

RILEY, J., concurred.

DARDEN, J., filed a separate written opinion in which he dissented, in part, as follows:

> I respectfully dissent. I believe that upon a jury's finding of negligence on the part of the defendant, its failure to award any damages to the plaintiff cannot be sustained unless there is simply no evidence that the plaintiff suffered any damage whatsoever.
>
> . . . .
>
> The jury returned a verdict for Gregory, finding that Neher was negligent. To the extent that the majority concludes that the jury could have found that *all* medical expenses incurred by Gregory did not necessarily result from the accident, I agree. However, given the undisputed evidence that this was a serious accident and that Gregory did immediately undergo a medical examination after the accident, at least some damages must have been incurred as a result of the accident. It may be that nominal damages would suffice in such a case. But here, no damages were awarded – suggesting that it is not reasonable for one involved in an automobile accident to seek a medical evaluation as to any injury therefrom.
>
> . . . .

CASE CLIPS is published by the
Indiana Judicial Center
National City Center - South Tower, 115 West Washington Street, Suite 1075
Indianapolis, Indiana 46204-3417
Jane Seigel, Executive Director
Michael J. McMahon, Director of Research
Thomas R. Hamill, Staff Attorney
Thomas A. Mitcham, Production

The Judicial Center is the staff agency for the Judicial Conference of Indiana and serves Indiana Judges and court personnel by providing educational programs, publications and research assistance.